No. _____

In The

Supreme Court of the United States

____ Term, 2009

ALISON E. CLAPP (O'CALLAGHAN)

and

JENNIFER M. CLAPP (SPIEGEL), *Petitioners*,

v

GUARDIANSHIP OF THORA M. MOULTON,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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and Jennifer M. Clapp (Spiegel)

QUESTIONS PRESENTED

1. May the elderly, poor and disabled be seized upon a *temporary guardianship* and confined for sixty (60) days – or until death -- *ex parte*, absent emergency, absent medical examination, and absent any hearing?

2. Upon a *temporary guardianship* and confinement as outlined, are not Fourth, Fifth, Eighth, and Fourteenth Amendment guarantees essential?

3. Is Indiana Code 29-3-3-4 ("*Proceeding in Lieu of Guardianship*" or "*emergency*" *temporary guardianship*) unconstitutional in any manner in whole or in part and/ or in practice?

PARTIES

The names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows: Alison E. Clapp (O'Callaghan), Jennifer M. Clapp (Spiegel), Petitioners; Guardianship of Thora M. Moulton, Respondent.

There is pending in the United States District Court for the Northern District of Indiana an action entitled *Thora M Moulton, Dec'd, by her next friend' personal representative, Alison E Clapp, on behalf of Thora M Moulton and or all others similarly situated v State of Indiana, et al.*, No. 2:09-cv-118 (PPS-APR).

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The opinion/ order of the State of Indiana Porter Superior Court. Porter County ("**Porter Superior Court**"). officially is not reported and appears in appendix ("**App**") at 9a. The opinion of the Court of Appeals of Indiana ("**Court of Appeals**") which affirmed officially is not reported and appears in App at 1a.

JURISDICTION

The order of *seizure and confinement* of the Porter Superior Court was entered on February 19, 2008. and appears in App at 11a. The final judgment of the Porter Superior Court was entered on August 11, 2008 and appears in App at 9a. Petitioners' appeal as of right to the Court of Appeals of Indiana was denied on March 17. 2009, and appears in App at 1a. Petitioners' petition for transfer to the Supreme Court of Indiana for discretionary review was denied on July 2, 2009 (App at 7a). In accordance with Rules 13.1 and 13.3 of this Court. this Petition is filed within 90 days of the date of denial of petition for discretionary review ("leave to appeal") – as extended for 40 days by this Court's Order dated September 24, 2009. *i.e.*. to and including November 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a) because the judgment of the Court of Appeals sought to be reviewed (i) draws into question the validity of a statute of a State on the ground of its being repugnant to the Constitution of the United States and. also (ii) a right and privilege is claimed under the Constitution or statutes of the United States. As the Constitutionality of a statute of the State of Indiana. *i.e* , Indiana Code 29-3-3-4. "*Emergencies; Appointment of temporary guardian* ...", is drawn into question and neither the State nor any agency. officer, or employee thereof is a party. Petitioners have served on the Attorney General of the State of Indiana notice that 28 U.S.C. § 2403 (b) may apply.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

As outlined in the Appendices, the following provisions are involved: United States Constitution, Fourth, Fifth, Eighth and Fourteenth Amendments; Indiana Code 29-3-3-4.

STATEMENT OF THE CASE

Upon a Petition, the trial court entered an emergency temporary guardianship order 2/19/08 pursuant to IC 29-3-3-4 over the person and estate of Thora Mary Moulton ("**Thora**"), a Valparaiso University ("**VU**") 40-year Professor. The court appointed a local attorney as guardian *ad litem* and a report was filed 3/20/08. No hearing was ever held. On 4/28/08, Thora passed away. On 8/11/08, the court ordered termination of the guardianship. Respectfully, upon appeal the appellate court avoided Constitutional issues.

Thora earned a Masters Degree from the University of Chicago and Ph D from Tubingen University, Germany. Thora joined the language faculty of VU and became eventual department head. During VU tenure, she befriended VU Professor, "*Hazel*". Upon the death of Hazel's husband, the women combined households at Thora's residence. This arrangement lasted for 10 years. Hazel's health declined. Thora cared for Hazel in a loving manner. During this time, Donald J. Evens, Esq ("**Atty Evans**") appeared as Hazel's counsel and provided a will for Hazel. Thora indicated that she was led to believe by Hazel and Atty Evans that "*..substantial financial assistance*" would be provided in a will. In 1990, Hazel died. Atty Evans advised that nothing was provided for Thora in the will.[1] In 1993, Atty Evans

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[1] Atty Evans prepared a few "T & E" documents – *power of attorney*, will, etc – essentially nothing else and all for immediate payment, cash or check. In 2003, fellow VU Professor, *Wilbur* ___ was added to the *power of attorney*. In December, 2006,

prepared a durable *Power of Attorney* with Petitioners granted such power.

In 1994, neighbors introduced M (a Native American), then 35 years of age, and her son, A, then 10, to share Thora's home. During the next 10 years, this arrangement continued as an "*extended family*". Thora's financial resources declined. Repeatedly, " . . *Atty Evans .. represented that M's participation...was key to Thora['s] ability to remain in the residence. . such 'people are hard to find' and M 'essential'* '" as M provided 24-hour care. In 2007, Atty Evans recommended a residence sale to VU with retained life estate. As events developed, however, the recommended "life estate" became terminable and "conditional".

In July (2007), Atty Evans structured / completed the residence sale to VU. Thereupon, immediately, Atty Evans contended to Thora that M had acted improperly relating to monies. In late 2007, Petitioners visited Thora – age 86. Petitioners observed that although her physical appearance had deteriorated "... *Thora Moulton's mental capacities were intact ..* " Atty Evans sought Thora's approval – eventually rejected – for transfer of a $20K legacy from Wilbur. Contemporaneously -- although unknown to Petitioners and Thora -- Atty Evans failed to address/ reveal month(s)-earlier plan for transfer of Thora from her residence to *Home Away from Home*. As Thora did not appear incompetent, Petitioners sought assistance from the *Indiana Adult Protective Services* ("K"), who in December, 2007, advised:

> " *for several months the agency had reviewed ... situation, had attended for a lengthy time at the residence for comprehensive interviews of Thora ... and others K*

Wilbur recommended a VU purchase of Thora's residence. Thora objected. Wilbur resigned In June, 2007, at age 93. Wilbur passed away.

addressed 2 inspections (eventual) housekeeping tips
In consideration of the $20,000 legacy and competency, K stated that the 'question of abuse is tricky' because the . [agency] had 'found her appropriate and able to direct her own care'"

For years, Myrna D. Trowbridge, D.O. ("**D.O. Trowbridge**") acted as "physician", at times with the assistance of the Adair agency. During February, 2008, for weeks, M suffered from a serious medical condition. This was unknown to Petitioners and many others. On 2/7/08, D.O. Trowbridge proposed arrangements be made for transfer to *Home Away from Home*, adding that "*Atty Evans 'several months earlier' had recommended as a destination.*" Shortly, 2/15/08 – 2/18/08, Adair facilitated Thora's transfer to *Porter Memorial Hospital* ("**Porter Hospital**"). Subsequent production of ER records revealed the presence of Atty Evans at the hospital:

"... [Thora] arrived ..2/15/08 . ."*mild moderate*" "*COPD*" and/ or "*COPD exacerbation*" .. . [T]his diagnosis is not identified as "*serious*" or "*critical*" ...

"... [N]ormal psychological condition. .. 2/15/08. ... 7:38 p.m. ...[Atty Evans] at . . bedside

"The next day, ... "*Patient is alert*", "*oriented x3*", "*not in any apparent respiratory distress*". ... [T]he "*Impression*" has been modified to: "*Acute exacerbation of COPD*" and includes a "*Plan I discussed with Dr Trowbridge regarding her home situation We need to get Social Service involved* .... Contemporaneously, in the "*Discharge Summary*", Thora['s] ... medical condition had improved: "*COPD stable.*"

" ..: *There were some legal issues that patient wanted to go home with a caregiver, but caregiver was hospitalized and her attorney got her admitted into home away from home facility, assisted living, where some issues were, but*

finally the patient agreed to go there. At this time, the patient is doing very well and will be discharged to home away from home"

"... [Petitioner(s) dispute(s)] ... that Thora ... provided any consent to ...transfer .... [R]ecord ... evidences ... consistent objection to any guardianship status and/ or *Home Away from Home* participation."

Although "*no emergency existed*", Atty Evans persuaded Porter Hospital to admit Thora. Medical tests administered during the 3-day stay revealed a benign condition. On 2/18/08 (Monday, *Presidents' Day*) D.O. Trowbridge telephoned to address a temporary transfer from the hospital to *Home Away from Home* -- "*to try it out*", that Atty Evans already had placed a $1,000 deposit. D.O. Trowbridge advised that M herself had been admitted to the same hospital the day earlier (Sunday, 2/17/08). Thora "*flatly refused*", demanded to "*go home*". Petitioner(s) informed D.O. Trowbridge, who responded: "'*I don't think Thora Moulton needs a guardian. Do you?' [Petitioner(s)] replied in agreement: "No.*"

"*As referenced, Atty Evans had not communicated with ...[nieces] ... at any time .. for many months concerning.. existence of . facility, nor ..$1,000 deposit [*2 weeks earlier*], nor... concerning guardianship. ... [Nieces] learned of these ... activities from Atty Evans only upon receipt of . ex parte application ...*

"*February 19, 2008, Petition' ... does not contain . . essential facts:* ***Dr. Trowbridge had not seen or otherwise 'examined' ... in nearly 2 years – and still hasn't. ... Dr. Trowbridge's ... unsworn 8-line letter [2/19/08] does not identify any mental impairment/ mental disease ... [nor "Emergency"]. Indeed, the letter does not identify any physical impairment/ ... disease which necessarily would determine debilitating***

'***incapacity***'.[2]

*February 20, 2008 .. Thora removed from . [h]ospital against her will '**strapped to a gurney**' and transferred to an entirely unknown place, i e , a barren room absent all possessions, money telephone, or any other common artifacts of life "*

Except for perfunctory message on the day after seizure, Atty Evans never telephoned – rather, mailbox delivery of *Petition* which contended:

¶ 3 ...Thora , is unable to maintain and care for her person or financial affairs and is presently residing at Porter Hospital and that an emergency exists because .. and Thora has for some time been financially exploited by her live-in caregiver and associated others yet has demonstrated an unwillingness and or inability to thwart said financial exploitation.

¶ 4 ... immediate steps to conserve . assets... .

¶ 5 .. has demonstrated an inability and or unwillingness actions in her financial . best interest

*¶ 9 ... immediate and irreparable injury to the person and injury, loss and damage to property .. may result before notice and hearing can be held [S]he has been the victim of financial exploitation by some of those most closely associated with her care previous to this time [**No***

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[2] Actually, Trowbridge D.O wrote

- " . [R]*eady to be discharged*
- " *[N]o plan in place [24 hour care] . at her home at this time* "

For 10 years, M had provided "*24-hour care*" – but now ill. **No "*irreparable injury*"**

proof, ever – no record of conviction or even arrest – none required.] ...

In consequence, absent all hearing, testimony or any other evidence, immediately, *i.e.*, "*over-the-counter*" the trial court entered Atty Evans drafted "Order", which in part states:

Comes now ... [Attorney Evans] who having filed his ... petition ...

. the Court, having examined said petition and the petitioner having appeared in person and by ... counsel ... [Attorney Evans], and the Court having heard evidence thereon, and being fully advised in the premises, now finds that the allegation contained in said petition are true, and that a temporary guardian ... should be appointed.

And the Court finds ...; that an emergency exists, and that immediate and irreparable injury to Thora ... or injury or loss or damage to her property may result before notice and a hearing can be held because.. ; and Thora ... has for some time been financially exploited by her live-in caregiver and associated others yet has demonstrated an unwillingness or inability to thwart said financial exploitation

Petitioner(s) objected:

"Apparently, Atty Evans seeks his own 'omnibus solution' for Thora ... life and 50-year-old M and A homeless as soon as possible ("2 weeks' notice"), no 'life estate' .... the residence promptly torn down and immediate availability for a VU reconstruction project."

Here, there is no heroic conduct by Atty Evans – just an elderly, frail woman punished for her 'fierce independence'. Respectfully, there can be no doubt that

these events have taken years off Thora[']s] life

The trial court appointed a *GAL* – a mid-sized law firm attorney. Admittedly, this designee lacked appropriate psychological/ medical and/ or similar expertise. Unfairly, the *GAL Report* sought *after-the-fact* justification for an unjust seizure particularly through attack against M – although never met. Petitioner(s) addressed the *Report*'s relentless insufficiency/ unfairness. The trial court declined to file Petitioner(s)' submission. Although the trial court had appointed the GAL on 3/7/08 and had scheduled a hearing for 3/26/08, on 3/14/08, the GAL advised Petitioner(s) that he did not intend to be present at the hearing, albeit required by Statute. Thora informed Petitioners she was "*waiting for her trial*" with "*her lawyer*", the GAL. Contemporaneously, Wilbur ___'s house, a gift to VU, was "torn down" [3]

On 3/13/08, Petitioners addressed *due process* concerns. Petitioners questioned that "*upon Atty Evans' alleged 'emergency', was not 'respite care' or a temporary stay a more reasonable solution rather than loss of all liberty in a place totally unknown* " and "*Is not D O Trowbridge's testimony in open court … essential?*" Petitioners identified that for the (then) continuing 22 days' confinement: "*neither Atty Evans nor D O Trowbridge visited or telephoned* " Indeed, inexcusably, Atty Evans and the State failed to provide:

- *any medical record(s) or timely medications including prescription drugs,*
- *customary ordinary accommodations that other residents experience:*

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[3] Sadly, Thora kept a napkin with the GAL's phone number by her bedside at *Home Away from Home* Thora believed that the GAL– "*her lawyer*" – would act in her interest

- *any familiar furnishings. possessions from her home.*
- *any music cultural intellectual resources.*
- *clothing from the residence or other adequate clothing, and*
- *a comfortable bed' sufficient toilet arrangements*

More, ... failed to promote any visitors -- even on Sundays Thus, unlike other residents who have visitors .... Thora ... remains confined essentially absent all family, friends, or visitors. In consequence. Thora ... remains isolated, depressed and abandoned Although Atty Evans [and the State are] .. well aware of these problems – created by Atty Evans' stark "remedy" – Atty Evans [and the State have] ... done nothing to secure . health, happiness and welfare ....

Within a week of the cancelled 3/26/08 "hearing", Atty Evans sought (and obtained) 1st Source Bank ("**1st Source**") as guardian of the estate – eventually estimated "insolvent". Other than a few over-lawyered documents for a "poor person", Atty Evans had nothing to do with Thora ... life. family or circumstances. Shortly, Petitioner(s) advised:

"Sadly, on April 28, 2008, Thora Moulton passed away at Porter ... subsequent to 2 ¼ months' confinement at Home Away from Home .

"Throughout ...., i.e., since Atty Evans' commencement . to/ until ... unexplained ... serious fall ... in confinement absent hearing, absent visit/ telephone by Atty Evans, absent any psychologist assistance. and .. proper level of care...

"It does not appear that any medical history and or medical record were requested by or provided It

appears that accommodation . did not provide sufficient handicap accessibility It appears that for 2 ½ months not examined by any physician It does appear that . sustained unexplained bruises and a serious fall one week prior to her death. As later events revealed. Indiana Adult Protective Services had Home Away from Home under investigation for some time [Petitioners] attended at a . funeral home The sisters were informed... that a Coroner investigation in progress and . an autopsy . .

'Upon death. Thora Moulton had few financial resources ... material possessions It appears that Atty Evans was extravagant $3,500 on a 1991 used car [value $900]. . replaced a gas stove at unreasonable cost in a residence known to have 24 ~ oxygen use spent .. $11K at the unacceptable Home Away from Home In sum. since the July. 2007. residence sale to [VU].. , Atty Evans . expended more than $50K . Now. Atty Evans wants to auction the rest " .

*" [E]ssential "hearing" ... never held although . 3 months ... ... [H]earing statutorily . . required while .. alive and able herself to present coherent opposition to . seizure and confinement . . **[T]here did not occur any hearing at/ upon the crucial 2/19/08 submission** ..*

REASONS FOR GRANTING THE WRIT

IC 29-3-3-4 Unconstitutional in Whole or in Part

In 1975. the Supreme Court in *O Connor v Donaldson*. 422 U.S. 563 (1975). ruled:

A State cannot constitutionally confine a non-dangerous individual who is capable of surviving safely in freedom by themselves or with the help of willing and responsible family members or friends

Here, regrettably, it appears that the State of Indiana seeks and has accomplished an end run around *O'Connor v Donaldson*. Respectfully, it appears that the State of Indiana has accomplished avoidance of the maze of Constitutional limitations imposed upon involuntary commitment cases through the mechanism of an "*Emergency Temporary Guardianship*" or "*Proceeding In Lieu of Guardianship*" IC 29-3-3-4 arrangement. Invariably, in the case law relating to involuntary commitment, Fourth Amendment analysis is addressed. Typically, in order to accomplish such restriction upon liberty, at least the following events are considered essential:

- medical evaluation by impartial professionals promptly and/ or within hours/ days;
- evidentiary hearing promptly scheduled;
- hearing held upon notice to individual and family; and
- temporary commitment – not lifetime sentence.

Here, concerning Thora none of these limitations were required or occurred:

- No medical examination by anyone – none required;
- No "emergency" – none required;
- No notice – none required;
- No hearing – none held.

The Fourth Amendment protects the right of the people "*to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures*". U.S. Const. Amend. IV. With few exceptions, the Fourth Amendment prohibits the warrantless entry of a person's home to make an arrest or to conduct a search. *Kyllo v United* States, 533 U.S. 27, 31 (2001). "A 'search' occurs

when an expectation of privacy that society is prepared to consider reasonable is infringed " *United States v. Brock*, 417 F.3rd 692, 696 (7th Cir. 2005) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984))

The Fourth Amendment prohibits those searches which are unreasonable *See Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *Riehm v. Engelking*, 538 F.3rd 952 (8th Cir. 2008) (warrant based upon sworn statement which contains "*deliberate falsehood*" or "*reckless disregard for the truth*" violates Fourth Amendment).

The Fourth Amendment applies to governmental searches and seizures in criminal investigations and in numerous civil proceedings. *See Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Villanova v. Abrams*, 972 F.2nd 792, 795-96 (7th Cir. 1992) (applies to involuntary commitment proceedings for dangerous persons suffering . mental illness). *See also, Safford Unified School Dist. # 1 v. Redding*, 557 U.S. __ (6/25/09) ("*special needs*" middle schooler "strip search" barred); *McCabe v. Life-Line Ambulance Serv.*, 77 F.3rd 540 (1st Cir. 1996) ("pink paper" 10-day commitment analysis).[4]

The Eighth Amendment applies to convicted prisoners. Courts have applied the same standard to pre-trial detainees under the Fourteenth Amendment's Due Process Clause. *See Cavalieri v. Shepard*, 321 F.3rd 616, 620 (7th Cir. 2003) (pre-trial detainee " *...entitled to at least the same protection against deliberate indifference to . basic needs as is available to convicted prisoners under the Eighth Amendment*"). *See also, Jackson v. Ill. Medi-Car, Inc.*, 300

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[4] Respectfully, for examples of these commonplace requirements, *see S.P. v. City of Takoma Park*, 134 F.3rd 260 (4th Cir. 1998); *Kenneth Tyler Scott v. Warren Hern, M.D.* (98-1320) (10th Cir. 1998); *King v. Beavers*, 148 F.3rd 1031 (8th Cir. 1997), and *D.W. v. Rogers* (96-6400) (11th Cir. 1997)

F.3rd 760, 764 (7th Cir. 2002) ("*...[W]hen considering a pre-trial detainee's claim of inadequate medical care, we frequently turn to the analogous standards of Eighth Amendment jurisprudence*").

The States have an affirmative duty to provide medical care to their inmates. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("*deliberate indifference to [the] serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'" and violates the Eight Amendment's prohibition against cruel and unusual punishments* *Id.* at 104). A civilly committed detainee is protected by the Due Process Clause of the Fourteenth Amendment. *Collignon v Milwaukee County*, 163 F.3rd 982, 987 (7th Cir. 1998) (protection against cruel and inhumane treatment defined as at least as extensive as that afforded to prisoners by the Eighth Amendment). *See also, Brown v. Budz*, 398 F.3rd 904, 909 (7th Cir. 2005) (Eighth Amendment analysis applied to 42 U.S.C. § 1983 claim brought by Joliet facility resident awaiting civil commitment trial). Thus, the Eighth (and Fourteenth) Amendment require that a civilly committed detainee be housed under "*humane conditions*" and provided with "*adequate food, clothing, shelter, and medical care*". *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

In addition to the absence of authority to represent Thora, the State's contention that Petitioners could have pursued interlocutory relief in the State system is belied by the *Indiana Rules of Appellate Procedure* (R.5 and R.14) which identify a "final order" appeals system with limited interlocutory exception – none of which here was available.

Thus, it does not appear possible (and/ or realistic) that any prompt appeal could have been pursued and/ or accepted prior to issuance of "final judgment", *i e*, the 8/11/08 close of guardianship order. The Indiana Court of Appeals fails to identify upon what procedural mechanism

such an "appeal" from the initial interlocutory order, 2/19/08, could have accomplished any possible entrance into the Court of Appeals. Obviously, none is mentioned, referred or itemized, as realistically none is/was possible. In retrospect, the Court of Appeals "*waiver*" and/or "*presumption*" excuses concerning IC 29-3-3-4 constitutionality leave little doubt that there never would have been any interlocutory appeal that made a difference.

CONCLUSION

Respectfully, for these reasons, the Petition for *Writ of Certiorari* should be granted. Respectfully, IC 29-3-3-4 should be ruled unconstitutional in whole or in part.

DATED
New York, New York
November 7, 2009

Respectfully submitted,

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APPENDIX

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel or the law of the case.

FILED
Mar 17 2009, 9:15 am
S/ Kevin S. Smith
CLERK
of the Supreme Court,
Court of Appeals and Tax Court

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IN THE COURT OF APPEALS OF INDIANA

ALISON E. CLAPP O'CALLAGHAN and JENNIFER M. CLAPP SPIEGEL,	)	
Appellants,	)	
vs.	)	No. 64A04-0809-CV-562
IN RE TEMPORARY GUARDIANSHIP OF THORA M. MOULTON, an Adult,	)	
Appellee.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Roger V. Bradford, Judge
Cause No. 64D01-0802-GU-1651

March 17, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Alison E. Clapp O'Callaghan[1] brings this pro se appeal of the trial court's order approving the guardians' final report and terminating the temporary guardianship of her late aunt, Thora M. Moulton.

We affirm.

FACTS

On February 19, 2009, Attorney Donald J. Evans filed a verified petition for the appointment of a temporary guardian over the person and estate of Thora M. Moulton, alleging that Moulton was "unable to maintain and care for her person or financial affairs" and "require[d] twenty-four hour, seven day a week care." App. 39). A statement from a physician attesting to the latter allegation was submitted with the petition. That same day, the trial court found "that an emergency exist[ed]" and that Moulton's "welfare ... require[d] immediate action." (App. 46). It issued an order appointing Evans as temporary guardian of Moulton and her estate.

On March 7, 2008, the trial court appointed a guardian ad litem to represent Moulton. On March 20, 2008, the guardian ad litem reported to the trial court on his personal meeting with Moulton and his review of relevant circumstances The guardian ad litem recommended that Evans be appointed guardian of her person and that 1st

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[1] O'Callaghan states in her brief that she and her "twin sister, Jennifer M. Clapp Spiegel" are "Appellants." Br. at 1. However, the brief contains only the original signature of O'Callaghan. Appellate rules require that the brief be signed. *See* Ind. Appellate Rule 23 (E). Therefore, we consider only O'Callaghan to be the appellant in this matter.

Source Bank ("the Bank") be appointed guardian of her estate.[2]

On April 1, 2008, Evans filed a petition seeking his replacement as temporary guardian over Moulton's estate. That same day, April 1, 2008, the trial court appointed the Bank as temporary guardian of Moulton's estate.

On April 28, 2008, Moulton died. On May 22, 2008, a final report and petition to terminate the guardianship was filed by the Bank and Evans; and they served O'Callaghan therewith. Also on May 22, 2008, the trial court issued its order setting a hearing for June 27, 2008, on the guardians' final report and petition to terminate the guardianship. The trial court's order directed that the guardian's filing "be served on" O'Callaghan. (App. 139). A letter dated June 12, 2008, from the trial court to O'Callaghan advised her that "a hearing via telephone conference" was not possible and "urge[d] her to attend in person or by counsel. (App. 185(a)).

At the outset of the hearing on June 27, 2008, the trial court noted that "Ms. Moulton's nieces" had been "advised

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[2] In his March 30, 2008 report, the guardian ad litem noted that he had been "informed that the nieces of [Moulton], Alison O'Callaghan and Jennifer Spiegel, possess health care power of attorney as well as financial power of attorney." (App. 83). Accordingly, the report continued, "in the event" that the nieces

> decide to help coordinate the move of [Moulton] to Pennsylvania, help in finding a suitable assisted living arrangement for [Moulton] in Pennsylvania, and agree to be involved in her everyday medical and personal care, if such takes place and [Moulton] is moved to Pennsylvania, then Donald Evans should be discharged as Guardian of the Person and First Source Bank of Valparaiso, Valparaiso, Indiana should be discharged as Guardian of the Estate, and the assets transferred to the nieces ... either (a) in their capacities as her Attorneys-in-fact, or (b) as Co-Guardians of her person and estate under a guardianship created under Pennsylvania law ..." *Id.*

that they needed to be here" if they objected to the petition, and "they're not here." (App. 22). Evidence was heard, and at the conclusion of the hearing, the trial court noted the statutory provision whereby "the guardianship terminates upon the death of the protected person." (App. 35). *See* Ind. Code § 29-3-12-1(b)(2).

On August 11, 2008, the trial court issued an order approving the guardians' final report and terminating the temporary guardianship. The order expressly stated that "notice of the" June 27, 2008, hearing had been "given to ... O'Callaghan," who did not "appear[] in person or by counsel." (App. 13).

DECISION

Indiana law provides that the trial court's actions in guardianship proceedings are exercised within the court's discretion. *See* Ind. Code 29-3-2-4(a). Accordingly, we apply an abuse of discretion standard when reviewing the trial court's action in this matter. *See In re Guardianship of Hollenga*, 852 N.E.2d 933, 936-37 (Ind. Ct. App. 2006). We find an abuse of discretion only when the decision of the trial court is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id.* at 937.

O'Callaghan frames her first issue as follows: "Is Indiana Code [section] 29-3-3-4 [providing for the appointment of a temporary guardian] unconstitutional in any manner?" Br. at 1. As we stated in *In re Estate of* Carnes, 866 N.E.2d 260, 264 (Ind. Ct. App. 2007), "pro se litigants are held to the same standard as licensed lawyers." O'Callaghan puts forth no cogent argument on any legal theory as to how the statute fails to pass constitutional muster. See Ind. Appellate Rule 46(A)(8)(a). Some of her rhetoric in this portion of her brief challenges the initial (February 18, 2008) order appointing a temporary guardian. She did not timely appeal that order, and she offers no

authority for the proposition that such is a proper subject for review subsequent to the termination of the guardianship.

"A statute is presumed constitutional." *Smith v Indiana Dep't of Correction*, 883 N.E.2d 802, 804 (Ind. 2009), and an appellant challenging the constitutionality of a statute "must rebut this presumption." *McManus v State*, 814 N.E.2d 253 (Ind. 2004), *cert denied* 546 U.S. 831. Further, a cardinal rule of appellate review is that the appellant bears the burden of showing reversible error. *See Morton-Adams School Corp v. Boone*, 840 N.E.2d 462, 468 (Ind. Ct. App. 2006); *In re K.H.*, 838 N.E.2d 477, 480 (Ind. Ct. App. 2005). O'Callaghan's open-ended assertion that the statute may be unconstitutional fails both to satisfy her burden and to rebut the presumption of constitutionality.

O'Callaghan next asserts that she had "request[ed] the [trial] Court enter an order that direct[ed] equitable compromise of credit card and other debts" in her May 30, 2008 "statement"[3] sent to the trial court. Br. at 18. She asserts that in her May 30, 2008, statement, she "proposed to accept trusteeship over the estate of Thora Moulton in lieu and stead of" Evans and the Bank. *Id.* She argues that this request was "reasonable and should be granted upon this appeal." Id. Such constitutes the entirety of her argument, and she offers no authority.

On May 30, 2008, when O'Callaghan made her informal "request," she had neither filed a pro se appearance nor obtained counsel to appear for her. Further, Moulton had died more than a month earlier. Finally, the guardians' petition for approval of their final report and to terminate the

---

[3] O'Callaghan sent seven statements to the trial court. The first statement, dated February 29, 2008, was "subscribed and sworn before" a notary; none of the other six were. None expressly "affirm[ed] under the penalties for perjury, that the foregoing representation(s) [we]re true." Ind. Trial Rule 11(B).

guardianship had already been filed with the trial court O'Callaghan proffers no authority for the proposition that it was error for the trial court to decline her "request." and we find none As her purported argument is supported by neither cogent reasoning nor authority, we find it waived. *See Liberty Mut Ins Co v OSI Industries*, 831 N.E.2d 192, 198 (Ind. Ct. App. 2005), *trans denied*[4]

The order appealed is the trial court's order approving the guardians' final report and terminating the guardianship. O'Callaghan has not met her burden of showing that the order constitutes an abuse of the trial court's discretion.

Affirmed. RILEY, J., and VAIDIK, J., concur.

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[4] We find to be waived O'Callaghan's asserted issue that "direction for guardian ad litem appointment [should] provide for psychological and/ or medical involvement." Br at 1, because she has failed to present an argument in support as to "why the trial court . . committed reversible error" in this regard. Ind. App. R. 46(A)(8).

[Seal of the Supreme Court State of Indiana]
Kevin S. Smith
Clerk

CLERK
SUPREME COURT, COURT OF APPEALS,
AND TAX COURT
STATE OF INDIANA
217 STATE HOUSE,
INDIANAPOLIS, IN 46204
317-232-1930 * FAX 317-232-8365

O'CALLAGHAN, ALISON CLAPP

...

BANGOR, PA ...

Cause Number
64a04-0809-CV-00562
Lower Court Number:
64D010802GU1651

O'CALLAGHAN, ALISON CLAPP ET AL – V-
GUARD'SHIP THORA MOULTON

You are hereby notified that the has on this day

SUPREME COURT 7/02/09

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW. ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE

THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR. KJ

WITNESS my name and the seal of said Court
this 2ND day of JULY, 2009

S/ Kevin S. Smith
Clerk Supreme Court, Court of Appeals and Tax Court

STATE OF INDIANA	)	**IN THE PORTER SUPERIOR**
	) **SS:**	**COURT**
COUNTY OF PORTER	)	**SITTING AT VALPARAISO, INDIANA**

IN THE MATTER OF THE GUARDIANSHIP OF THORA M. MOULTON, AN ADULT	)	**CAUSE NUMBER 64D01-0802-GU-1651**

FILED
IN OPEN COURT
AUG 11 2008
S/ Roger V. Bradford
JUDGE PORTER SUPERIOR COURT

ORDER APPROVING GUARDIANS' FINAL REPORT TERMINATING GUARDIANSHIP AND APPROVING FEES FOR THE GUARDIAN OF THE ESTATE

Comes now Donald J. Evans (temporary guardian for the person of Thora Mary Moulton) and 1st Source Bank (temporary guardian for the estate of Thora Mary Moulton and formerly known as First National Bank). and submit their verified "Guardians' Final Accounting, Petition to Terminate Guardianship. and Request for Guardian Fees. which is on file with the Court and a part of the Court's record.

And the Court. having examined said pleading and being duly advised as to the facts. now finds as follows:

1 That the facts stated and reported are true and shall be approved:

2. That notice of the hearing on the accounting. report, and request for fees was given to the following individuals: Allison E. Clapp O'Callaghan. Jennifer M. Clapp and 1st Source Bank. Said hearing was held on June 27, 2008 at 9:30 A.M.. and neither Allison E Clapp O'Callaghan nor Jennifer M. Clapp appeared in person or by counsel.

3. That the guardian fees requested in the accounting and report are reasonable and should be ordered paid from the incapacitated person's assets.

IT IS THEREFORE ORDER. ADJUDGED. AND DECREED by the Court that

1 The guardians' final accounting and petition to terminate the guardianship be. and hereby is. in all respects approved:

2. That 1st Source Bank. as temporary guardian for the Estate of Thora Mary Moulton, is hereby allowed the sum of Nine Hundred Twenty and 00/100 Dollars ($920.00) for services rendered as temporary guardian of the estate.

3 That the guardianship is terminated.

4 That distribution is hereby directed to be made as shown on the final report to the decedent's personal representatives/ successor trustees. Allison E. Clapp O'Callaghan and Jennifer M. Clapp.

5. That the balance shown on the final accounting shall be distributed to Allison E. Clapp O'Callaghan and Jennifer M. Clapp. in fiduciary capacity as personal representatives for Thora Mary Moulton's estate and/ or successor trustees of the Thora Mary Moulton Revocable Self-Declaration Living Trust Agreement dated April 4. 1993. and that upon making said distribution, the temporary guardian for the estate shall file a Supplemental Report with the Court, along with a receipt evidencing said distribution.

ALL OF WHICH IS FOUND AND RECOMMENDED ON this 11 day of August. 2008.

S/ James Alan Johnson
MAGISTRATE, PORTER SUPERIOR COURT

ALL OF WHICH IS ORDERED this 11th day of August. 2008

S/Roger V. Bradford
JUDGE. PORTER SUPERIOR COURT

STATE OF INDIANA	)	**IN THE PORTER SUPERIOR**
	) SS:	**COURT**
COUNTY OF PORTER	)	**CAUSE NO: 64D0_1_-0802-GU-1651**

IN THE MATTER OF THE GUARDIANSHIP OF THORA M. MOULTON, AN ADULT

FILED
IN OPEN COURT
FEB 19 2008
S/ Roger V. Bradford
JUDGE PORTER SUPERIOR COURT

ORDER APPOINTING TEMPORARY GUARDIAN OVER THE PERSON AND ESTATE OF INCAPACITATED PERSON

Comes now Donald J. Evans. who having filed his verified petition for the appointment of a temporary guardian over the person and estate of Thora M. Moulton. which petition is on file with the Court's record.

And the Court, having examined said petition. and the petitioner having appeared in person and by his counsel. Donald J. Evans. and the Court having heard evidence thereon. and being fully advised in the premises. now finds that the allegation contained in said petition are true. and that a temporary guardian over the person and estate of Thora M. Moulton should be appointed.

And the Court finds that a guardian has not been previously appointed for Thora M. Mouton: that an emergency exists: that the welfare of Thora M. Moulton requires immediate action: that no other person has the authority to act under the circumstances (or. to the extent that the authority exists through a Durable Power of Attorney. it has not been exercised in the best interests of Thora M. Moulton): and that immediate and irreparable injury to Thora M. Moulton or injury or loss or damage to her property may

result before notice and a hearing can be held because: Thora M Moulton requires twenty-four hour, seven day a week care(see letter from Dr. Myrna Trowbridge attached to petition), the live-in caregiver who has been providing assistance to Thora M. Moulton is presently unable to do so; the condition of Thora M. Moulton's home compromises her health and makes it unlikely that another live-in care giver can be readily located and retained on a long-term basis; although Thora M. Moulton's first preference would be to return home, she is unable to pay for twenty-four hour, seven day a week care on a sustained basis from a licensed home health care agency, she is not presently eligible for "Medicaid waiver" services due to an excess in "countable resources," and she has a history of resisting needed health care from licensed home health care providers; and Thora M Moulton has for some time been financially exploited by her live-in caregiver and associated others yet has demonstrated an unwillingness and/ or inability to thwart said financial exploitation.

The Court further finds that Thora M. Moulton is in need of a guardian by reason of her illnesses for which she needs immediate assisted living services for which she is unwilling to give her consent, and that it is in the best interests of Thora M. Moulton that a temporary guardian be appointed over her person and estate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the court that:

1. Donald J. Evans is appointed as temporary guardian of Thora M. Moulton for a period not to exceed sixty (60) days from the date of this order;

2 The temporary guardian shall serve as guardian upon taking an oath without the posting of bond;

3 The Clerk shall issue letters of temporary guardianship to Donald J. Evans upon due qualification which letters shall show that the temporary guardians'

powers and responsibilities are limited as follows: the power and responsibility to obtain twenty-four hour, seven day a week health care for Thora M. Moulton at "Home Away From Home" (or, in the alternative if this is not possible, the least institutional setting consistent with her health care needs); the power and responsibility to secure Thora M. Moulton's home located at ____, Valparaiso, ____, Indiana ___ and its contents; the power and responsibility to secure Thora M. Moulton's car; the power and responsibility to obtain banking records from First National Bank concerning the use of Thora M. Moulton's money in account number ___; the power and authority to authorize disbursement of an inheritance intended for Thora M. Moulton from the estate of Wilbur ___; and the power and responsibility to write checks on Thora M. Moulton's checking account number ____ at First National Bank in order to pay for her health care and other ongoing bills.

4. Donald J. Evans shall file within thirty (30) days after the date of this Order an inventory with the Court;

5. Within thirty (30) days after the termination of the appointment as temporary guardian, Donald J. Evans shall file with the Court a written verified account of the administration as temporary guardian which shall include a description and report on Thora M. Moulton's physical and mental condition and current status of the property over which he had control.

ALL OF WHICH IS FOUND AND RECOMMENDED this 19 day of February, 2008.

S/ James Alan Johnson
MAGISTRATE, PORTER SUPERIOR COURT

ALL OF WHICH IS ORDERED THIS 19 day of February, 2008.

S/ Roger V. Bradford
JUDGE, PORTER SUPERIOR COURT

STATE OF INDIANA)		IN THE PORTER SUPERIOR
	) SS:	COURT
COUNTY OF PORTER)		CAUSE NO: 64D01-0802-GU-1651

IN THE MATTER OF THE GUARDIANSHIP OF THORA M. MOULTON, AN ADULT

FILED
IN OPEN COURT
FEB 19 2008
S/ Roger V. Bradford
JUDGE PORTER SUPERIOR COURT

PETITON FOR APPPOINTMENT OF TEMPORARY GUARDIAN OVER THE PERSON AND ESTATE OF INCAPACITATED PERSON

Comes now Donald J. Evans, your petitioner herein, who being duly sworn petitions the Court as follows:

1. That the petitioner is an adult person with law offices at ___, Valparaiso, ___, Indiana __.
2. That the petitioner has served as the attorney for Thora M. Moulton for many years and has longstanding knowledge of her circumstances.
3. That Thora M. Moulton is a fiercely independent, retired female professor from Valparaiso University who is 86 years of age, is unable to maintain and care for her person or financial affairs and is presently residing at Porter Hospital, ___, Valparaiso, __, Indiana, and that an emergency exists because: Thora M. Moulton requires twenty-four hour, seven day a week care (see attached letter from Dr. Myrna Trowbridge); the live-in caregiver who has been providing assistance to Thora M. Moulton is presently unable to do so; the condition of Thora M. Moulton's home compromises her health and makes it unlikely that another live-in care giver can be readily located

and retained on a long-term basis: although Thora M. Moulton's first preference would be to return home. she is unable to pay for twenty-four hour. seven day a week care on a sustained basis from a licensed home health care agency. she is not presently eligible for "Medicaid waiver" services due to an excess in "countable resources," and she has a history of resisting needed health care from licensed home health care providers; and Thora M. Moulton has for some time been financially exploited by her live-in caregiver and associated others yet has demonstrated an unwillingness and/ or inability to thwart said financial exploitation.

4. That the need exists for the appointment of a temporary guardian in order that said temporary guardian may take immediate steps to conserve the assets of Thora M. Moulton and give consent for proper health care for Thora M. Moulton.

5 That Thora M. Moulton is unable to maintain and care for her financial affairs and person due to the fact that she suffers from the medical conditions described in the attached letter from her physician, Dr. Myrna Trowbridge. and she has demonstrated an inability and/ or unwillingness to take actions in her financial and medical best interests

6 That Thora M. Moulton owns checking account number __ at ___, in __. her home contains some antiques of value as well as quite possibly cash. and she is the beneficiary of an as yet undistributed bequest from the estate of Wilbur__ that is needed to supplement her income in order to pay for her medical care and ongoing expenses.

7 That Thora M. Moulton owns a "life estate" in --- real property ___. Valparaiso. Indiana. and the "remainder interest" --- is owned by ____ Valparaiso University

8 That to the best of the petitioner's knowledge there is no guardian of the person or estate appointed for Thora M. Moulton in this state or in any other state and no guardianship proceedings are pending.

9 That the person most closely related by blood or marriage to Thora M. Moulton are the following two nieces, _____ and that an emergency exists whereby the petitioner requests that notice of said petition for the appointment of a temporary guardian be waived pursuant to Indian Code 29-3-3-4. in that immediate and irreparable injury to the person and injury. loss and damage to the property of Thora M. Moulton may result before notice and hearing can be held on the petition for appointment of guardian because Porter Hospital intends to discharge Thora M. Moulton this evening. she has no credible. sustainable plan for care at her home. she has been the victim of financial exploitation by some of those most closely associated with her care previous to this time. and her nieces have both expressed and demonstrated an unwillingness and/ or inability to assume the authority granted to them pursuant to a Durable Power of Attorney appointing them as attorneys-in-fact for Thora M. Moulton concerning both her financial affairs and health care.

10. That the institution having the care and custody of Thora M. Moulton is Porter Hospital, ___, Valparaiso, __ Indiana __.

11. That the petitioner herein, Donald J. Evans, is the legally appointed guardian of Elizabeth __. Peter __. Sarah __, June ___ and Kathleen ___ in the Porter Superior Court.

12. That the petitioner requests that the Court grant him the following responsibilities and powers as temporary guardian: the power and responsibility to obtain twenty-four hour. seven day a week health care

for Thora M. Moulton at "Home Away From Home" (or, in the alternative if this is not possible, the least institutional setting consistent with her health care needs), the power and responsibility to secure Thora M. Moulton's home located at ___, Valparaiso, ___, Indiana __ and its contents; the power and responsibility to secure Thora M. Moulton's car; the power and responsibility to obtain banking records from First National Bank concerning the use of Thora M. Moulton's money in account number ___; the power and authority to authorize disbursement of an inheritance intended for Thora M. Moulton from the estate of Wilbur___ ; the power and responsibility to write checks on Thora M. Moulton's checking account number ___ in order to pay for her health care and other ongoing bills.

13. That the name and address of the attorney representing said temporary guardian is Donald J. Evans, whose law offices are located at ___, Valparaiso, ___, Indiana __.

WHEREFORE, your petitioner prays the Court to enter an Order finding:

1. That the court inquire into the matter herein, and finding the facts herein stated to be true, appoint a temporary guardian over the person and estate of Thora M. Moulton.
2. That the petitioner herein, Donald J. Evans, is a suitable person to be appointed temporary guardian for the person and estate of Thora M. Moulton
3. That said temporary guardian be authorized to consent so that proper and adequate health care may be afforded to Thora M. Moulton.
4. That immediate and irreparable injury to the person and injury, loss or damage to the property of Thora

M. Moulton may result before notice and a hearing can be held on the petition for guardianship.

5 And for all other relief which is proper in the premises.

S/ Donald J. Evans
DONALD J. EVANS

I affirm. under the penalties for perjury, that the foregoing representations are true to the best of my knowledge and belief.

S/ Donald J. Evans
DONALD J EVANS

This Instrument Prepared By:
Donald J. Evans
Attorney and Counselor at Law
[address/ Phone] Attorney Number ___

* * * * *

OPTIMUM HEALTH CENTER

MYRNA D. TROWBRIDGE, D.O.
BOARD CERTIFIED IN FAMILY PRACTICE
___, VALPARAISO, IN_ _[phone] __[fax]__

February 19, 2008

To whom it may concern:

My patient, Thora Moulton, has been hospitalized the past few days at Porter Valparaiso Hospital Campus and is ready to be discharged. She was treated for an exacerbation of her chronic obstructive pulmonary disease, and she also has severe osteoarthritis and is confined to a wheelchair. Therefore, she requires 24-hour care. There is no plan in place for her to have such care at her home at this time. I recommend that she be transferred to an assisted living facility in Valparaiso, specifically Home Away From Home, at the unit located at 2504 Primrose where there is a space available and a 24-hour care giver. This place will be adequate for her medical needs.

Sincerely,
S/ Myrna D. Trowbridge, D.O
Myrna D. Trowbridge, D.O.

MDT/ls

[Docket Sheet]

PORTER CIRCUIT/ SUPERIOR COURTS

DATE: 7/15/08 CASE #: D 01 GU 08-02-01-551000

TYPE: GUARDIANSHIPS STATUS: PENDING

GUARDIANSHIP OF THORA M. MOULTON

MAJOR EVENTS

2/19/08 ORD APT TEMP GUARDIA

3/07/08 GAL APPPOINTMENT ....

PROCEEDINGS

FILING DATE EVENT COMMENT ...

2/19/08 ACTION OPENED

2/19/08 GUARDINASHIP OPENED

INCAPACITATED ADULT

2/19/08 PTN APT TEMP GU FLD

PTN FOR APT OF GUARDIAN
W/WAIVER(S) AND CONSENT(S)

2/19/08 ORD APT TEMP GUARDIA

OATH FLD BOND PER LR 54
LETTER TEMP GUARDIANSHIP

2/19/08 LETTERS ISSUED

ISSUED 4 CC LETTER . .

....

STATE OF INDIANA	)	IN THE PORTER
	)ss	SUPERIOR COURT
COUNTY OF PORTER	)	CAUSE NO: 64DO-0802-GU-1651

IN THE MATTER OF THE TEMPORARY)
)
GUARDIANSHIP OF THORA M.)
)
MOULTON, AN ADULT.)

FOURTH SUPPLEMENTAL STATEMENT OF ... [AEC]

...

Now comes Alison E. Clapp (O'Callaghan), your affirmant, who under penalties of perjury presents this Fourth Supplemental Statement ...: ....

9. Affirmant disputes that Thora ... provided any consent to any transfer to (or from) *Home Away from Home* Indeed, the entire record before this Court evidences Thora['s] ... consistent objection to any guardianship status and/ or *Home Away from Home* participation. ....

11. Respectfully, it appears that the commencement of this "Temporary Guardianship" was unnecessary. ....

13. .... Thora ... was (and remained) psychologically normal. Indisputably, there did not occur medical "*exigent circumstances*". Respectfully, the short absence of a caregiver should not justify an *ex parte* temporary guardianship.

14. In context of the *Indiana Adult Protective Services* conclusion that Thora ... was "*able to direct her own care*", respectfully, any guardianship if at all, should have been authorized solely upon well-

documented medical evidence of exigency (or incompetence) together with a court proceeding subject to cross-examination relating to Thora['s] ... contended "financial exploitation."

15. ... [A]s earlier identified by Affirmant, Thora ... should have been provided the opportunity to be heard at any proceeding relating to her *personhood*. Instead, Thora ... was made subject to a summary proceeding *absent notice*. Thora['s] ... very small "family" entirely was *excluded*, more, unfairly characterized by Atty Evans as *disinterested*.

16. Respectfully, it appears that the statute identified in the manner applied may well be *unconstitutional*. Regrettably, the record evidences denial to a person of the ability timely to appear and challenge efforts to extinguish their personhood and associated rights.

17. .... [T]here does not appear to have been any justification for the *ex parte* seizure and confinement ... ..., [T]hroughout, Thora ... remained entirely opposed.

18. ...[T]he application of this statute ... regrettably "*took years off her life*". ...[R]ather than psychological assistance or ... "*Social Service*" involvement, it appears that Thora ... was made subject to psychological distress and unnecessary injury to her personhood. Sadly, this was accomplished absent any hearing upon notice – eventually, absent any hearing at all. ....

June 20, 2008

S/ Alison E. Clapp O'Callaghan)

ALISON E. CLAPP (O'CALLAGHAN)

Appellant's Case Summary

in the

Indiana Court of Appeals

Appeal Information – A short and plain statement of the anticipated issues on appeal:

Wrongful and unconstitutional seizure of person and property absent due process and other appropriate safeguards – and – failure of guardianship standards: and validity of IC-29-3-3-4

[Signed 9/26/08] S/ Alison E. Clapp (O'Callaghan) and sister JMCS

* * * * *

Appellant's Main Brief to Indiana Court of Appeals (in part)

STATEMENT OF ISSUES

Is Indiana Code 29-3-3-4 unconstitutional in any manner? *Inter alia*. should not direction for guardian *ad litem* appointment provide for psychological and/ or medical involvement? ....

In Appellants "Supplemental Statement", 3/13/08, *due process* concerns were raised. Appellants questioned that "*upon Atty Evans' alleged 'emergency', was not 'respite care' or a temporary stay a more reasonable solution rather than loss of all liberty in a place totally unknown....*" and "*Is not Dr. Trowbridge's testimony in open court ... essential?*" Appellants identified that for the (then) continuing 22 days' confinement: "*neither Atty Evans nor Dr Trowbridge . . has*

visited or telephoned." Indeed, throughout such time, inexcusably, Atty Evans failed to provide/ furnish *inter alia*:

- *timely medications including prescription drugs,*
- *customary/ ordinary accommodations that other residents experience;*
- *an appropriate chair/ recliner as have all other residents, . .*
- *<u>any</u> familiar furnishings/ possessions from her home;*
- *any music or other cultural/ intellectual resources, particularly in context of career and intellectual capacities,*
- *clothing from the residence or other adequate clothing;*
- *a comfortable bed/ sufficient toilet arrangements;*
- *security for a vehicle, and*
- *access to Thora Moulton's elderly dog*

More, Atty Evans has failed to promote any visitors...confined essentially absent all family, friends, or visitors ..Thora Moulton remains isolated, depressed abandoned

In Appellant(s)' <u>Third Supplemental Statement</u>, <u>5/30/08</u>, Appellant(s) advised:

"Sadly, on April 28, 2008, Thora Moulton passed away at Porter Memorial Hospital subsequent to 2 ¼ months' confinement at Home Away from Home. ....

' Throughout this time... remained in confinement . absent hearing, absent visit, telephone by Atty Evans.

absent any psychologist assistance, and apparently absent the proper level of care at a facility especially selected by Atty Evans and Dr Myrna Trowbridge .. It does not appear that any medical history and or medical record were requested by or provided to Home Away from Home It appears that ... accommodation ... did not provide sufficient handicap accessibility It appears that for 2 ¼ months . not examined by any physician It does appear that .. sustained unexplained bruises and a serious fall while at Home Away from Home one week prior to her death As later events revealed, Indiana Adult Protective Services had Home Away from Home under investigation for some time A 147-49.

ARGUMENT POINT I.

INDIANA CODE 29-3-3-4 IS UNCONSTITUTIONAL

Respectfully, it appears that the commencement of this "Temporary Guardianship" was unnecessary. In *Guardianship of Wells*, No. 55D01-9807-GU-25, dated 7/20/00, the Indiana Court of Appeals addressed temporary guardianship. In the case, upon in person medical opinions to a family which identified "*exigent circumstances*", members of the family sought guardianship relief "absent notice". In *Wells*, the Indiana Court of Appeals stated:

The undisputed facts are that Myrtle lives in her home .... Myrtle was hospitalized in the summer of 1998 after experiencing symptoms of a stroke Physicians treating Myrtle informed her family that they believed Myrtle was then incapable of taking care of herself. When her condition became critical, one doctor told ... [daughter], that Myrtle might need a guardian " very, very soon"... in order to make "some very critical medical decisions". ... They suggested that the family should seek appointment of a guardian to make those decisions. The doctors made it clear that time was of the essence by telling the children

that Myrtle "probably was not going to make it, and that someone needed to be Guardian to make decision on whether or not to put her on life support".

. Pursuant to the doctors' advice, the ... children went to the office of a nearby attorney and filed an emergency petition requesting that .. [daughter] be appointed guardian. Before going to the attorney's office, ... [family] called all of Myrtle's children who lived out-of-state and informed them of their intention to seek the appointment of a temporary guardian for Myrtle
(Emphasis added.)

The facts in the Thora Moulton situation could not be more different. On 2/19/08, absent all medical evidence and absent any "hearing", Atty Evans used I.C. 29-3-3-4 to obtain an Order to seize Thora Moulton at Porter Hospital, strap her to a gurney and transfer her to a barren room at "*Home Away from Home*", there to remain absent everything in life – until death. Thereafter, for more than 2 months, the Court did not hold the statutorily required hearing concerning this VU Professor's life and continual objection to seizure and confinement. Thora Moulton was (and remained) psychologically normal. Indisputably, there did not occur medical "*exigent circumstances*". Respectfully, the short absence of a caregiver should not justify an *ex parte* temporary guardianship. In context of the *Indiana Adult Protective Services* conclusion that Thora Moulton was "*able to direct her own care*", respectfully, any guardianship if at all, should have been authorized solely upon well-documented medical evidence of exigency/ incompetence together with a court proceeding subject to cross-examination relating to Thora Moulton's contended "*financial exploitation.*"

Respectfully, Thora Moulton should have been provided the opportunity to be heard at any proceeding relating to her *personhood*. Instead, Thora Moulton was

made subject to a summary proceeding *absent notice*. Thora Moulton's very small "family" entirely was *excluded*, more, unfairly characterized by Atty Evans as *disinterested*.

Respectfully, the statute identified in the manner applied is *unconstitutional*. Regrettably, the record evidences denial to a person of the ability timely to appear and challenge efforts to extinguish their personhood and associated rights. As addressed in *Wells*, it is the person and the family who are most appropriate to determine end of life and end of personhood decisions for a family member. Respectfully, there does not appear to have been any justification for the *ex parte* seizure and confinement of this Valparaiso University Professor. Indisputably, throughout, Thora Moulton remained entirely opposed.

The *Transcript* for the 6/27/08 guardianship "termination" hearing was received only recently. Respectfully, Appellants provide a brief response. Throughout, it appears that Atty Evans essentially addressed "credit card" concerns. A 23-24. There appears no concern by Atty Evans for the seizure of Thora Moulton which Atty Evans had accomplished months earlier. In the Petition for seizure, "*credit card debt*" is not referenced as a concern, rather, contended *financial exploitation*. Respectfully, it should remain undisputed that Atty Evans never had evidence of *financial exploitation* -- except as Atty Evans hypothesized. Difference of view concerning *power of attorney* activity for payment of credit card bills is far from use of IC 29-3-3-4 to plan and accomplish a seizure of a competent person against his/ her will – indeed, upon "hypothesis" of *financial exploitation*,[5] more, absent any notice/ involvement of "family".

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[5] Notably, Teresa Hansen – who failed to return Appellants' 2 telephone calls – was brought to the "final hearing" by Atty Evans but did not testify. Respectfully, it is submitted that at the request of Atty Evans, Teresa Hansen interviewed Thora Moulton (8/07).

Respectfully, the "role" of Appellants was not to seize their closest relative absent all hearing or evidence. Such "role" remains authorized solely upon immediate due process hearing/ standard guardianship proceeding. This woman was not in a "snow bank", was not in any "dire emergency" – no more than the inconvenience of an ill companion. Nonetheless, absent all actual evidence, for months – until death – the Court, Atty Evans, and his assistants, assured there would occur no change in Thora Moulton's confinement and psychological despair. Further, throughout those several months, neither Atty Evans nor 1st Source nor Teresa Hansen nor anyone else with authority did anything to reduce the debt all knew was increasing absent all reason or justification.[5]

Atty Evans' "direct examination" of 1st Source's witness omits the abysmal circumstances of that time. .... The details of Thora Moulton's last days remain especially sad in the memory of her family. For many hours over several days, Appellants observed the death of their closest relative. Minutes later, the nieces were advised by another total stranger, a mortician, that a Coroner's inquest and an autopsy were imminent – absent all involvement/ consent by

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determined "competency", then addressed with Atty Evans another way to "*close the file*". Sadly, allowance for an attorney – any attorney – to seize a "person" notwithstanding competent upon unproven accusations, indeed, absent all "hearing" of any kind, does not satisfy minimal due process.

[6] Although a 1st Source witness testified ..., there is omitted that the "jewelry" available was "costume" and that with heat/ electricity/ water soon extinguished, conditions became unbearable in the residence. Throughout and until very recently, 1st Source had not identified any credit card companies. More, to date, 1st Source has not forwarded to Appellants the few thousand dollars which remain in the seized account. Thus, even should Appellants seek a compromise of credit card debt, Appellants are absent Thora Moulton's funds and information to accomplish a compromise.

the nieces. Thereafter, within minutes, an immediate meeting was compelled by 1st Source – purportedly -- to arrange for payment of a funeral expense. Under these facts and circumstances, one consistency remains -- Atty Evans' conduct: to the last – even through the 6/27/08 hearing – only about money.

As evidenced earlier, the application of this statute in the manner identified regrettably "*took years off her life*". Indeed, rather than psychological assistance or the recommended "*Social Service*" involvement, it appears that Thora Moulton was made subject to psychological distress and unnecessary injury to her personhood. Sadly, this was accomplished absent any hearing upon notice – eventually, absent any hearing at all. Respectfully, here, in order to satisfy due process, what the Statute required was not a "final hearing", rather, an initial hearing, one with admissible evidence of "*financial exploitation*" and true emergency.

CONCLUSION

Respectfully, Appellants request that the Court: declare Indiana Code 29-3-3-4 unconstitutional; provide directions upon any GAL appointment re: medical/ psychological involvement: .... [dated 12/5/08]

[Signed Alison E. Clapp (O'Callaghan), Jennifer M. Clapp (Spiegel)]

Constitution of the United States

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

Fifth Amendment (*in part*)

No person shall be .... nor be deprived of life, liberty, or property, without due process of law; ...

Eighth Amendment (*in part*)

Excessive ...., nor cruel and unusual punishments inflicted.

Fourteenth Amendment (*in part*)

Section 1 .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes of Indiana

IC 29-3-3-4

Emergencies; appointment of temporary guardian; suspension of guardian; ... [*in pertinent part*]

Sec. 4 (a) If:

(1) A guardian has not been appointed for an incapacitated person or minor;
(2) An emergency exists;
(3) the welfare of the incapacitated person or minor requires immediate action; and

(4) No other person appears to have authority to act in the circumstances.

The court, on petition by any person or on its own motion, may appoint a temporary guardian for the incapacitated person or minor for a specified period not to exceed sixty (60) days. No such appointment shall be made except after notice and hearing unless it is alleged and found by the court that immediate and irreparable injury to the person or injury, loss, or damage to the property of the alleged incapacitated person or minor may result before the alleged incapacitated person or minor can be heard in response to the petition. If a temporary guardian is appointed without notice and the alleged incapacitated person or minor files a petition that the guardianship be terminated or the court order modified, the court shall hear and determine the petition at the earliest possible time.

(b) If the court finds that a previously appointed guardian is not effectively performing ....

(c) A temporary guardian appointed under this section has only the responsibilities and powers that are ordered by the court. The court shall order only the powers that are necessary to prevent immediate and substantial injury or loss to the person or property of the alleged incapacitated person or minor in an appointment made under this section.

(d) Proceedings under this section are not subject to the provisions of IC 29-3-4.

(e) A proceeding under this section may be joined with a proceeding under IC 29-3-4 or IC 29-3-5.

As added by P.L. 169-1988, SEC 1. Amended by P.L 33-1989, SEC. 65, P L 154-1990, SEC 13